White Cap, Inc. *and* Chicago Local No. 458-3M of the Graphic Communications International Union, AFL–CIO. Case 13–CA–33033

July 24, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN AND HURTGEN

On April 15, 1997, Administrative Law Judge Leonard M. Wagman issued the attached decision. The Respondent filed exceptions and a supporting brief. Both the Charging Party and the General Counsel filed answering briefs to the Respondent's exceptions, and the General Counsel additionally resubmitted his brief to the judge. The Respondent filed a reply brief in support of its exceptions.

The National Labor Relations Board has delegated its authority to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

1. I disagree with the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by imposing an unreasonable time limit for union ratification of the Respondent's proposed collective-bargaining agreement, and by threatening to withdraw certain contract proposals unless the Union met that ratification deadline.

The parties commenced negotiations for a new collective-bargaining agreement in December 1993. The Respondent announced at the outset of negotiations that its principal contract objective was to secure union agreement to change operations from a 5- to a 6-day workweek under which employees would work three 12-hour shifts per week. The Respondent had converted to this new work schedule at two other locations, and it explained to the Union its view that the new schedule benefited both the Respondent and the unit employees.

In early February 1994[1] the Union agreed to present to its membership for ratification the Respondent's contract proposal, which included the new work schedule, improvements in certain contract areas,[2] and maintenance of annual cost-of-living adjustments (COLAs) but not a wage increase. In lieu of a wage increase the Respondent offered a lump sum bonus of 1 week's pay to be given to the unit employees when the new work schedule went into effect. Union Vice President Richard Catalano advised the Respondent that the bonus was inadequate and hence that the union bargaining committee would not endorse the contract proposal but would leave approval to the membership. The union membership voted down the proposal on February 12. The union negotiating committee notified the Respondent that the principal reason for rejection was the lack of a wage increase.

The parties thereafter resumed bargaining. The record shows that negotiations in essence involved union acceptance of the new work schedule in exchange for increased wages and benefits. On May 12 the Union informed the Respondent that a membership poll showed that two-thirds of the unit employees would vote for the new work schedule if they also received a wage increase. On June 13 the Respondent made a contract proposal which included wage increases, as well as certain other improvements the Union had sought. The proposal additionally required implementation of the 6-day work schedule by July 11, on which date the Respondent planned to implement the new work schedule among certain nonbargaining unit employees. The union negotiators believed the new proposal was excellent and announced to the Respondent that they would recommend it to the unit employees. On June 19 the union negotiating team explained the proposal to the membership. As Union Business Representative Miller testified, the union negotiating committee ''highly recommended this proposal to the membership.'' The employees voted and rejected the proposal.

On June 24 the Respondent faxed a letter to the Union stating, inter alia, as follows:

> As you know, *solely in order to get acceptance* of our offer—an offer that was *already* very generous—we added or improved several items. Those items were added *only* after repeated assurances from you and your committee that our increased offer would satisfy your members' needs. [Emphasis in original.]

The letter continued:

> Our goal remains a fair agreement (fair to *both* sides) implemented in time to be of real value. Therefore, we urge you to resubmit our offer to your membership *immediately* with the strongest possible message that it will *not* be improved. [Emphasis in original.]

The letter stated that ''[a]s a further incentive to ratify our offer,'' six wage and benefit elements of the proposed contract would be withdrawn from the proposal if it was not ratified by July 1.[3] The letter concluded:

[1] All subsequent dates are in 1994 unless otherwise noted.

[2] For example, the Respondent explained to the Union that it agreed to a monthly increase of $50 per unit employee in its contributions to the health and welfare fund ''in the hope of moving us along and not having a major bone of contention[.]''

[3] The listed items were: (1) 2-percent wage increase effective August 1, 1994; (2) 1-percent wage increase effective August 1, 1996; (3) proposal to compute overtime after 36 hours; (4) proposal to pay

> We sincerely hope that our offer *will* be accepted and the withdrawal of these beneficial items will not be necessary. However, [White Cap] is firmly committed to the proposed scheduling changes as a necessary component of our business plan for 1994 and beyond. [Emphasis in original.]

The Union requested an extension of the ratification deadline until July 10, asserting that there was insufficient time to hold a membership meeting by the deadline of July 1 because of the July 4 holiday. The Respondent extended the deadline until July 5 but refused any further extension. The Union did not hold a ratification vote by that deadline. The parties resumed negotiations in September.

The judge found that the Respondent engaged in bad-faith bargaining by its threat to withdraw the six provisions listed in its June 24 letter and by imposing the July 5 deadline for ratifying the proposed contract. The judge reasoned that the June 24 letter constituted regressive bargaining designed to obstruct agreement with the Union and that the July 5 deadline was unreasonably short. I disagree with the judge on both counts.

Citing *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984), the judge correctly recognized that in determining whether a party has engaged in unlawful surface bargaining, the Board considers the party's ''overall conduct.'' The judge then relied on *Driftwood Convalescent Hospital*, 312 NLRB 247, 252 (1993), for the proposition that ''the withdrawal of a proposal by an employer without good cause is evidence of a lack of good faith bargaining . . . where the proposal has been tentatively agreed upon.'' I find it unnecessary to pass on the continued viability of *Driftwood* because I believe that the judge erred in his application of these principles to the facts of this case.

Assessing the Respondent's ''overall conduct'' includes examination of the actions taken prior to the events in question. In this regard, there can be no doubt that the Respondent engaged in good-faith bargaining from the inception of negotiations through June 19 when the union membership rejected the Respondent's June 13 proposal. The record establishes that the Respondent consistently made concessions to address the Union's concerns and to reconcile differences between the parties. Indeed, the judge himself found that the Respondent improved its February contract offer with economic provisions to induce the membership to accept the new work schedule and ratify the contract. Even the union negotiators considered the Respondent's June 13 proposal to be excellent, and they seemed convinced that the employees would ratify it.

On June 19, however, the Union's membership voted against the proposed collective-bargaining agreement for the second time. On June 24, the Respondent advised the Union that six items in its June 13 offer would be withdrawn if ratification did not take place by July 1. Thereafter, the Respondent extended the ratification deadline to July 5.

Several considerations persuade me that the Respondent did indeed have ''good cause'' for threatening to withdraw the six provisions listed in its June 24 letter unless the Union's membership ratified the June 13 proposal by July 5. First, the June 24 letter was a response to the rejection of the Respondent's June 13 proposal by the union membership. In other words, the six tentatively agreed to items had already been rejected at the time the Respondent threatened to withdraw them. Although the judge did not discuss this factor, I consider it to be an important one that distinguishes this case from *Driftwood Convalescent Hospital* where the employer withdrew from tentative agreements with the union before any ratification vote had been held.[4]

Second, the Respondent did not unalterably withdraw the six items from any further consideration by the Union. Instead, it offered the Union one more opportunity to secure ratification of the entire June 13 proposal, including the six items in question.

Third, I cannot agree with the judge that the July 5 ratification deadline was unreasonable. To be sure, the duty to bargain in good faith requires that ''each party [have] the opportunity to digest, understand, and evaluate the other's proposals as they are made, without saddling the other party with artificial deadlines or threats.'' *Toyota of San Francisco*, 280 NLRB 784, 801 (1986). However, this is just not a case where an unreasonably short ratification deadline denied the union negotiating team sufficient time to analyze the Respondent's contract proposal. Rather, the union negotiators had already reviewed the June 13 proposal and highly recommended it.[5] The evidence further shows that both the Respondent and the Union had explained the new work schedule to unit employees, and specifically addressed their concerns regarding the schedule. The record evidence warrants the conclusion that the Respondent satisfied its duty under Section 8(a)(5) to provide the Union the opportunity to digest,

vacation pay at 40 hours; (5) proposal to pay holiday pay based on 8 hours' pay; and (6) proposal to increase health and welfare contribution by $50 per month.

[4] In addition, in *Driftwood Convalescent Hospital*, the employer offered the union no explanation whatsoever for withdrawing from the tentative agreements. By contrast, in this case, the Respondent fully explained its position in its June 24 letter to the Union.

[5] Compare *Federal Mogul Corp.*, 212 NLRB 950, 951 (1974), enfd. mem. 524 F.2d 37 (6th Cir. 1975) (ratification deadline did not permit union negotiators sufficient time or opportunity to meet for a needed analysis of the respondent's contract proposal); and *Driftwood Convalescent Hospital*, supra at 253 (same).

understand, evaluate, and vote on the June 13 contract proposal.[6]

Fourth, the Respondent had stressed from the inception of negotiations its desire for timely implementation of the new schedule. Its June 13 contract proposal explicitly required implementation of the 6-day work schedule by July 11. Union negotiators Catalano and Miller both testified that they understood that the Respondent sought to implement the new work schedule on July 11. Union negotiator Miller further testified that he understood on June 13 that the Respondent had started the process of phasing in the new work schedule among nonunit employees. The judge found, and the record confirms, that the Respondent in fact implemented the new schedule among certain nonbargaining unit lithographic employees on July 11. Finally, union negotiator Miller testified that the Respondent explained at the June 13 negotiating session that 6 days were needed in order to prepare for conversion to the new work schedule. Six days after the July 5 ratification deadline was the Respondent's scheduled implementation date of July 11. All this record evidence supports the conclusion that the July 5 deadline was reasonably related to legitimate business objectives which the Respondent explained to the Union.[7]

Fifth, the Respondent had stressed to the Union throughout negotiations that improved contract terms were linked to timely implementation of the new work schedule. When the union membership rejected the Respondent's June 13 proposal, including the 6-day work schedule, the Respondent reminded the Union of this link and warned that the employees were placing in jeopardy the economic benefits that were offered in exchange for prompt implementation of the new work schedule. In the context of the totality of the negotiations, the Respondent's letter can reasonably be viewed as an effort to secure ratification of the agreement it reached with the Union, rather than an attempt to obstruct meaningful bargaining.

Accordingly, in light of all these considerations, and because my colleagues join me in this result, we reverse the judge and conclude that, following the employees' rejection of the June 13 proposal, the Respondent did not violate Section 8(a)(5) by threatening to withdraw from tentative agreements with the Union or by imposing the July 5 deadline for ratification of the proposed contract.[8]

2. I further disagree with the judge's findings that the Respondent violated Section 8(a)(5) and (1) of the Act by engaging in regressive bargaining and withdrawing contract proposals when the parties resumed negotiations in September, by unilaterally implementing in October its final proposal in the absence of an impasse, and by thereafter locking out the unit employees and hiring replacements for some of them.

When the parties resumed negotiations on September 14 and 22, the Respondent adhered to its position that it would withdraw six items from its June 13 contract offer. The Respondent additionally announced four modifications to its June 13 offer: (1) termination of COLAs; (2) a change from double time after 12 hours of work to time and one-half; (3) reduction of the night-shift differential from 80 cents to 40 cents; and (4) deletion of the voluntary overtime provision. The Respondent articulated two rationales for its bargaining position: (1) it reiterated that the improved terms had been unsuccessfully offered to gain timely ratification of the new work schedule; and (2) an economic downturn in its operations.

The Respondent reaffirmed its commitment to the new work schedule. The Union, however, made contract counterproposals based on the traditional 5-day work schedule. The Respondent rejected these proposals. The Respondent thereafter on September 22 distributed its proposed collective-bargaining agreement reflecting all its modifications listed above as well as the new work schedule. The Respondent stated that this was its final position and there would be no movement with the exception of four items: wage increases, vacations, holidays, and night-shift differential.

Negotiations continued on October 4. The Union declared that the unit employees had rejected the 6-day workweek no matter how the Union tried to persuade them to accept it. The Union did not offer any counterproposal to the Respondent's September 22 offer, but rather insisted that its proposal based on the traditional 5-day work schedule was still on the table. The Respondent stated that there were still four items open for discussion. The Union did not make a counteroffer. Union negotiator Richard Catalano asked Respondent's negotiator Maxine Curtis whether the parties had reached an impasse. Curtis replied, ''[W]hat do you think, Rich?'' The meeting ended without the parties discussing or selecting a date for further negotiations.

[6] As the Respondent argues, the parties' past practice supports a finding that the 10-day period between June 24 and July 5 was sufficient time for the Union to conduct a second ratification vote. Thus, the record shows that the February ratification vote occurred on 3 days' notice, and the June ratification vote occurred on 6 days' notice.

[7] Compare *Driftwood Convalescent Hospital*, supra at 253 (violation where respondent failed to present legitimate employer interest or explanation for ratification deadline).

[8] *Dayton Electroplate*, 308 NLRB 1056 (1992), relied on by the Charging Party, is distinguishable. In concluding that the respondent in that case bargained in bad faith, the Board relied, ''in particular,'' on two factors, neither of which is present here: (1) the respondent offered no explanation for its decision to renege on its prior agreements with the union; and (2) the respondent engaged in conduct away from the bargaining table that was inconsistent with an intent to bargain in good faith. Id. at fn. 3.

On October 5, the Respondent notified the Union by letter that on October 10 it would implement its September 22 final proposal ''over which we are now deadlocked.'' The Union in response on October 6 called a membership meeting on October 8 on which date the membership voted to accept the June 13 proposal.

The Respondent implemented its final offer on October 10. On that date Catalano told the Respondent that the membership had ratified the June 13 proposal. The Respondent replied that that proposal had been withdrawn and replaced by the September 22 offer. The Union asserted that it would not accept the September 22 offer which did not include a wage increase or COLA.

The two negotiating committees met on November 9 at the Union's request. The Union urged the Respondent to return to its proposal of June 13. The Respondent declined. It nevertheless offered to grant wage increases in the form of lump sum payments, with the first payment made within 30 days after contract ratification. The Respondent further offered to return additional improvements that had been contained in the June 13 offer: paying vacation pay at 40 hours; paying holiday pay based on 8 hours' pay; and increasing health and welfare contributions by $50 per month. The Union requested additional improvements. The Respondent indeed presented some improvements, including a modification of the mandatory overtime proposal that was to the Union's satisfaction. The Respondent urged the Union to take this latest proposal to the employees for a vote and stated that this was its final offer. Union negotiator Catalano rejected this final proposal, primarily because of the elimination of COLAs.

On November 13 the union membership voted down the Respondent's last offer. On November 20 the Respondent issued a lockout notice conditioning the return to work on the Union's signing of the Respondent's final offer. The lockout remained in effect from November 21, 1994, until October 16, 1995, when the parties executed a collective-bargaining agreement. In February 1995 the Respondent hired some replacements for the locked out employees.

I have carefully examined the totality of circumstances here and conclude that the Respondent by its overall bargaining conduct satisfied its duty to bargain in good faith when negotiations resumed in September. *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984). Following the expiration of the lawful July 5 ratification deadline, the Respondent did not refuse to bargain further, but resumed bargaining in September. The Respondent indeed agreed to meet on November 9 at the Union's request, even after it believed the parties were deadlocked over the new work schedule. The record further shows the Respondent's willingness to compromise and make concessions when negotiations resumed—by offering movement on wage increases, vacations, holidays, and night-shift differential—and it in fact made concessions on these and other areas on November 9. ''[A]lthough Section 8(d) does not require the making of a concession, the definition of 'good faith,' as developed by the Board and the courts, includes a willingness to compromise as an important factor.''[9]

The record evidence does not support a finding that the Respondent engaged in unlawful regressive bargaining when it diminished certain contract terms on resumption of bargaining. It is settled that the withdrawal of previous proposals does not per se establish the absence of good faith, but rather represents one factor in the totality of circumstances test. *Aero Alloys*, 289 NLRB 497 (1988); *NLRB v. Randle-Eastern Ambulance Service*, 584 F.2d 720, 725 (5th Cir. 1978). The Board examines the respondent's explanation for its change in position to determine whether it was undertaken in bad faith and designed to impede agreement. *Merrell M. Williams*, 279 NLRB 82, 83 (1986); *O'Malley Lumber Co.*, 234 NLRB 1171, 1179 (1978). As shown above, the Respondent provided a good-faith explanation for its change in bargaining position in September: it was seeking timely ratification and implementation of the new work schedule in exchange for improved contract terms, and failure to secure its goal—following ample time for good-faith negotiations—would result in diminished terms.[10] This is simply not a case where the Respondent withdrew its bargaining offer without explanation or to circumvent imminent union acceptance.[11]

Further, the record evidence establishes an intent, even a desire, by Respondent to reach agreement. Good-faith bargaining ''pre-supposes a desire to reach ultimate agreement, to enter into a collective bargaining contract.'' *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 485 (1960). A party who enters into bargaining negotiations with a take-it-or-leave-it attitude violates its duty to bargain because good-faith bargaining means more than going through the motions of negotiating. The essential element is rather the serious intent to adjust differences and to reach an acceptable

[9] *Sparks Nugget, Inc. v. NLRB*, 968 F.2d 991, 994 (9th Cir. 1992), quoting Timothy O'Reilly, eds. *The Developing Labor Law*, 306 (5th supp. 1982–1988 2d ed. 1989).

[10] In light of this legitimate explanation, I find it unnecessary to pass on the Respondent's economic justification.

[11] Compare *Mead Corp. v. NLRB*, 697 F.2d 1013, 1022 (11th Cir. 1983), enfg. 256 NLRB 686 (1981) (respondent bargained in bad faith by withdrawing its proposal without good cause knowing that acceptance by the union was imminent). I agree that the Respondent had ''good cause'' for its bargaining positions and that it explained this ''good cause'' to the Union. Accordingly, I consider it unnecessary to decide the issue of the continued viability of *Driftwood Convalescent Hospital*, 312 NLRB 247 (1993), raised by the concurrence.

common ground.[12] Here, there is no evidence that the Respondent sought to avoid reaching an agreement. Indeed, substantial record evidence shows that the Respondent continually urged the Union to present its offers to the membership for ratification. Nor did the Respondent adopt a take-it-or-leave-it bargaining stance. Rather, both before and after the July 5 ratification deadline, it attempted to adjust differences with the Union and reach an acceptable compromise involving approval of the new work schedule in exchange for improved contract terms.

It is also appropriate to look at the Respondent's actions in light of the Union's bargaining conduct.[13] Upon resumption of negotiations in September the Union made contract proposals based on the traditional 5-day work schedule, despite the Respondent's announcement 10 months earlier that its main objective was conversion to the new work schedule. The Union declined to make counterproposals on the significant wage and benefit issues that remained open. The Union declared to the Respondent on October 4 that the unit employees had rejected the new work schedule no matter how the Union tried to persuade them to accept it. These facts constitute substantial evidence that the parties on October 4 were at impasse on the critical issue of the work schedule, which precluded reaching an agreement.[14] Since Chairman Gould concurs in this result, we accordingly find, contrary to the judge, that the Respondent lawfully implemented its September 22 proposal on October 10 following impasse.

The Supreme Court has made clear that an employer does not violate the Act by locking out employees following a bargaining impasse for the sole purpose of bringing economic pressure to bear in support of a legitimate bargaining position. *American Ship Building Co. v. NLRB*, 380 U.S. 300, 310–311, 318 (1965). The Respondent's conduct fits squarely within this rule: the Respondent resorted to the lockout only following impasse and in support of its legitimate bargaining position. Significantly, even following impasse, the Respondent continued to bargain, make concessions in order to adjust differences with the Union, and only resorted to the lockout when the union membership again voted down the Respondent's proposal on November 13.

In light of all these circumstances, I would find that the Respondent satisfied its duty to bargain in good faith.[15] Since Chairman Gould joins me in this result, we shall accordingly dismiss the complaint in its entirety.

[12] *American Meat Packing Corp.*, 301 NLRB 835 (1991); and *General Electric Co.*, 150 NLRB 192 (1964), enfd. 418 F.2d 736 (2d Cir. 1969).

[13] See, e.g., *Optica Lee Borinquen, Inc.*, 307 NLRB 705, 720–721 (1992).

[14] *Television Artists AFTRA v. NLRB*, 395 F.2d 622, 627 fn. 13 (D.C. Cir. 1968), affg. sub nom. *Taft Broadcasting Co.*, 163 NLRB 475 (1967).

ORDER

The complaint is dismissed.

CHAIRMAN GOULD, concurring.

I agree with Member Hurtgen's conclusion that the administrative law judge erred in finding that the Respondent Employer violated Section 8(a)(5) and (1) of the Act by its conduct in the bargaining negotiations. I must write separately to stress that tough and sometimes distasteful tactics are often lawful under the National Labor Relations Act. Specifically, I will discuss whether an employer can utilize so-called ''regressive bargaining'' to exert pressure on a union. While I join in Member Hurtgen's conclusion that the Respondent's actions did not constitute bargaining in bad faith, I must disagree with his discussion of this doctrine.

Section 8(a)(5) and 8(d) of the Act limit the bargaining tactics undertaken by employers,[1] respectively, by prohibiting bargaining undertaken with a bad-faith intent not to consummate a collective agreement. *Atlanta Hilton & Tower*, 271 NLRB 1600 (1984). But, in doing so, Section 8(d) specifically states that the bargaining obligation ''does not compel either party to agree to a proposal or require the making of a concession.'' The Supreme Court in the so-called ''freedom of contract'' trilogy[2] has interpreted these provisions as

[15] I find, contrary to our dissenting colleague, that the evidence concerning the September 22 and October 4 bargaining sessions is insufficient to support a finding that the Respondent unlawfully refused to bargain with the Union about the elimination of COLAs and overtime. Although the Respondent characterized its positions on COLAs and overtime as final and stated that there would be no movement on them, the Act ''does not, *per se*, compel 'auction' bargaining or forbid the use of a 'best offer first' bargaining technique, nor does it require the yielding of bargaining positions fairly maintained.'' *Long Island Jeep, Inc.*, 231 NLRB 1361, 1367 (1977). Significantly, at no time did the Respondent specifically reject a union request to bargain over COLAs or overtime. I also note that, at the September 22, 1994 bargaining session, the Respondent told the Union that: (1) there would be no movement on COLA and overtime; and (2) certain other items were open for negotiation. As to the ''no movement'' remark, I believe that the statement is lawful. Sec. 8(d) provides that concessions are not required. As to the second matter, inasmuch as other items were said to be open for negotiation, the implication could be that Respondent would not negotiate as to COLA and overtime. However, the ambiguity, if any, was resolved on November 9. At that time, the Respondent demonstrated flexibility by changing its position on overtime and by offering wage increases in lieu of COLA. The dissent opines that the Respondent's proposals of November 9 did not cure a violation of September 22. However, as noted above, there was no violation on September 22. There was an ambiguous statement which was clarified by the conduct of November 9.

[1] Of course, Sec. 8(b)(3) similarly limits the bargaining tactics of unions.

[2] The trilogy consists of *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952); *NLRB v. Insurance Agents' Union*, 361

permitting ''the parties [to] 'take their gloves off' and to exert whatever economic pressure is at their disposal.'' William B. Gould IV, *A Primer on American Labor Law 105* (3d ed. 1993). In light of these provisions, as interpreted by the Supreme Court, an employer's bargaining tactics are permissible as long as they are not designed or serve to affect the union's role in the collective-bargaining process or ''used . . . as a means . . . to evade his duty to bargain collectively.''[3] The so-called ''regressive bargaining'' tactics utilized by the Respondent in this case do not so qualify and, consequently, must be upheld as lawful.

To summarize the facts of the case at hand, the Respondent twice made ''regressive'' proposals, i.e., reducing the generosity of individual items contained in prior packages of contract proposals in the course of bargaining. But, it is *uncontested* that the Respondent engaged in lawful bargaining from December 1993 (when it first proposed a new work schedule) to June 19, 1994. The Respondent offered concessions in order to obtain timely implementation of its central demand, a 6-day workweek. And, after the union membership voted down the proposal on June 19, it offered the Union a second opportunity to ratify the same package—but coupled with a threat to withdraw certain elements in the event of rejection.[4]

After a summer hiatus in bargaining, on September 14, the Respondent once again presented a new proposal, but which now included the threatened (and other) withdrawals. The Respondent implemented its last offer after additional bargaining sessions and the presentation of yet another proposal—and continued union resistance to the revised work schedule. Furthermore, even after implementation, the Respondent improved the terms of its offer. After this offer was overwhelmingly rejected, the Respondent locked out its employees pending union ratification of the last offer, which it did 11 months later.

This sequence of events certainly indicates ''hard bargaining,'' on the part of the Respondent, but, as noted by Member Hurtgen, it also clearly evidences a willingness to reach agreement. And it is that willingness—and not the relative attractiveness of its proposals—which constitutes bargaining in good faith. See *Atlanta Hilton & Tower*, supra.

I wish to emphasize, however, the lawfulness of so-called ''regressive bargaining'' when it is not undertaken in the general context of an intent to evade coming to an agreement. In finding bad faith in the Respondent's regressive tactics, the judge's decision states that withdrawal from tentative agreements unless accompanied by an explanation of good cause for doing so demonstrates unlawful regressive bargaining. Member Hurtgen does not pass on this rule, but distinguishes the Respondent's conduct on the basis that it provided a ''good cause'' explanation to the Union for its change in position. I would find this ''rule'' to be utterly inconsistent with both the Supreme Court's ''freedom of contract'' trilogy as well as long-held principles of collective bargaining. Inasmuch as the cases cited by the judge do support this standard, they should be overruled.

In finding regressive bargaining to be unlawful, the judge here relied primarily on *Driftwood Convalescent Hospital*, 312 NLRB 247, 252 (1993); Member Hurtgen in reversing the judge distinguishes *Driftwood* on the basis that there the employer offered no explanation to the union. In *Driftwood*, however, the Board adopted the administrative law judge's finding, which in turn, relied on the Board's prior decision in *Arrow Sash & Door Co.*, 281 NLRB 1108 fn. 2 (1986). There, the Board, while noting that ''the totality of the circumstances'' indicated lack of good faith,[5] also went on to state that the true issue was whether the Respondent had good cause in withdrawing from its tentative agreements and concessions made in the course of bargaining thus far.[6] Contrary to this holding, for the reasons stated below, I would agree with then-Chairman Dotson's prescient comment that the central issue was whether ''the [r]espondent [had] engaged in such conduct for the purpose of avoiding its bargaining obligation or reaching final agreement with the [u]nion.'' Id.

Contrary to the *Arrow Sash* rule, it has been the default practice of collective-bargaining negotiations to allow withdrawal at will from tentative agreements prior to final agreement. Professor Chamberlain in an early treatise on collective bargaining stated that:

> Until the conclusion of the entire contract and its approval in entirety by both parties, however, any agreement upon particular issues is recognized as only tentative, for the clauses of a contract may be interrelated. The settlement of one may be affect the determination of another, and a concession on one clause won early in the conference may be traded by it for a concession on another

U.S. 477 (1960); and *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965).

[3] See *American Ship Building v. NLRB*, supra at 308.

[4] The Union never conducted the second vote.

[5] The employer there had essentially shut down negotiations in reaction to an employee sick-out.

[6] A number of prior cases also stated a requirement of ''good cause'' withdrawal, but arose in the context of a precipitate withdrawal of proposal in order to prevent a general agreement. See *Mead Corp. v. NLRB*, 697 F.2d 1013, 1022 (11th Cir. 1983) (withdrawal after union indicated probable acceptance); and *Gerstenslager Co.*, 202 NLRB 218, 225 (1973) (''wholesale abrogation of provisions previously agreed to''). But see *Merrell M. Williams*, 279 NLRB 82, 83 (1986), where the Board found a withdrawal lawful because ''[t]here is no other indication that the [r]espondent was withdrawing from the agreements in order to frustrate the bargaining process or avoid reaching a contract.''

> issue more important to it sometime later. Neil W. Chamberlain, *Collective Bargaining* 88 (McGraw Hill 1st ed. 1951).[7]

Similarly, the Board also recognizes this principle as the default rule of collective negotiations:

> In the normal course of negotiations, there is much give and take until a final collective-bargaining agreement is reached. Frequently, agreement may be reached on some issues, only to be modified as other issues come into play. Consequently, there is usually no binding agreement until a final, complete agreement is reached. Notwithstanding that practice, parties negotiating for a contract always have the ability to make any provisions final and binding along the way, thus precluding any further negotiations on those issues. . . . Absent such evidence, we conclude that, as in the normal course of negotiations, the parties here reached agreement on several provisions en route to reaching a final agreement, but no agreement became final and binding until the final contract was made. [*Stroehmann Bakeries*, 289 NLRB 1523, 1524 (1988).]

Here, it would be particularly inappropriate to find the Respondent's withdrawals unlawfully regressive because the Respondent was clearly following the ''normal course'' and adjusting its proposals on a wide range of issues in the course of bargaining in order obtain agreement on a crucial issue.[8]

In sum, this case clearly indicates the compatibility of the Respondent's simultaneous possession of a clear intention to reach an agreement with the Union and the wielding of harsh regressive tactics against the Union. Applying pressure to the Union by such tactics may seem, to those uninitiated to the world of ''hard ball bargaining,'' overwhelming evidence of a bad-faith intent. But, collective bargaining is wide open and rough and tumble where both parties use their resources and economic strength as best they can. The applicable standard here must be only whether the Respondent's tactics provided full scope for good-faith bargaining. Since the evidence here clearly indicates that the Respondent Employer was seriously negotiating in order to obtain an agreement, we must find that it was bargaining in good faith. I would further hold that regressive bargaining, in the absence of an intent to evade bargaining, is a fully lawful bargaining tactic under Section 8(d) of the Act, and would overrule any prior cases holding otherwise.

MEMBER LIEBMAN, concurring in part and dissenting in part.

For the reasons stated in section 1 of Member Hurtgen's opinion, I join him in finding that the Respondent did not bargain in bad faith in June 1994[1] following the employees' rejection of the contract it negotiated with the Union.[2] However, contrary to my colleagues, I would find that the Respondent unlawfully refused to negotiate with the Union in September and October about two mandatory subjects of bargaining. As shown below, my rationale for finding a violation of the Act differs from that of the judge, who concluded that when the Respondent made regressive proposals in September and October, it ''was motivated by a desire to obstruct and frustrate the bargaining process.'' Given my finding that the Respondent refused to negotiate in fact as to two subjects within Section 8(d), it is unnecessary for me to reach the issue of whether the Respondent bargained in bad faith by making regressive proposals.

There is no dispute as to the relevant facts. At the September 14 negotiating session, the Respondent announced certain changes in its prior proposal of June 13. At the next session on September 22, the Respondent distributed a proposed collective-bargaining agreement embodying the terms announced on September 14. The Respondent inscribed circles in the margins next to all but four provisions in the proposed agreement, informing the Union that the items circled were the Respondent's final positions and that there would be no movement on them. The Respondent also said that the four unmarked provisions were open for negotiations.

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[7] See also C. Loughran, *Negotiating a Labor Contract: A Management Handbook* 48 (BNA 1992) (all agreements on individual issues are tentative until final agreement by union to employer's complete offer); and C. Stevens, ''Strategy and Collective Bargaining Negotiations'' in D. Rothschild, L. Merrifield & C. Craver, *Collective Bargaining and Labor Arbitration* 28–29 (Michie 1988) (agreement on individual items may be withdrawn prior to final agreement).

[8] The judge here goes on to imply that, as a general matter, an employer's substitution of a prior bargaining proposal with a less generous proposal, in the absence of justification or explanation, also constitutes regressive bargaining. Member Hurtgen again distinguishes the present situation on the basis that the Respondent provided a good-faith explanation. In contrast, I am of the view that mandating such an explanation would require the Board to make, in effect, a substantive assessment of a party's specific proposals. In *Reichold Chemicals*, 277 NLRB 639 (1985), modified by 288 NLRB 69 (1988), however, the Board held that it would generally forbear from the subjective consideration of the content of a party's in determining whether a party has bargained in good faith. Moreover, any other rule would be inconsistent with the Supreme Court's prohibition of the Board ''either directly or indirectly . . . sit[ting] in judgment upon the substantive terms of collective-bargaining agreements.'' *American National Insurance*, 343 U.S. at 404, quoted in *McClatchy Newspapers*, 321 NLRB 1386, 1390 (1996). (Although, the Board, in *Reichold Chemicals*, 288 NLRB at 69, did not preclude reading proposal language and examining a party's insistence of an extreme proposal in certain situations.)

[1] All subsequent dates are in 1994.

[2] In joining with Member Hurtgen to reverse the judge on this issue, I emphasize that I agree with the legal principles cited by the judge. My disagreement is solely with the way these principles were applied to the facts of this case.

The circled items encompassed two entirely new proposals: First, the Respondent proposed the elimination of cost of living adjustments (COLAs), even though COLAs had been included in the parties' contracts since 1973 and had been part of the Respondent's contract proposals from the outset. Second, the Respondent proposed the elimination of voluntary overtime, even though a voluntary overtime provision had been included in the parties' prior contracts and had been part of the Respondent's contract proposals from the outset. Neither one of these subjects was mentioned in the Respondent's June 24 letter to the Union in which it threatened to withdraw six items from its June 13 proposal. In sum, the record is clear that in September the Respondent proposed for the first time the elimination of COLAs and the elimination of voluntary overtime, and stated that it would not negotiate as to either of these items.

The Respondent reiterated its position at the October 4 session, stating that there were three or four issues open for negotiation, an obvious reference to the items that had not been circled in its September 22 proposal. The necessary implication of the Respondent's statement was that its changed positions on COLA and overtime were *not* open for negotiations. The judge specifically found that at this session the Union protested that the Respondent ''had taken COLA off the table.''

The October 4 session ended without selection of a date for further negotiations. On October 10 the Respondent implemented its September 22 proposal.

The duty ''to bargain collectively'' set forth in Section 8(a)(5) is defined in Section 8(d) as the obligation to ''meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment.'' A refusal to bargain about a subject falling within this category violates the statutory duty to bargain ''without a general failure of subjective good faith.'' *NLRB v. Katz*, 369 U.S. 736, 743 (1962). As the Court explained in *Katz*:

> A refusal to negotiate *in fact* as to any subject which is within [Section] 8(d), and about which the union seeks to negotiate, violates [Section] 8(a)(5) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end. [Emphasis in original.]

The Court's statement aptly describes this case. Even assuming, as my colleagues find, that the Respondent was acting in overall good faith, the fact remains that it adamantly refused to bargain with the Union in September (and again in October) about two mandatory subjects of bargaining that it had newly introduced into the negotiations. Importantly, its proposals on these issues, about which it refused to bargain, were seriously regressive ''take-backs'' of items which had never been an issue before, and which were important to the Union and the unit employees. Accordingly, I would find that the Respondent violated Section 8(a)(5) and (1) on and after September 22 by refusing to bargain with the Union about the elimination of COLAs and the elimination of voluntary overtime.[3]

Although Member Hurtgen finds that the parties were at impasse on October 4, it is well established that ''a lawful impasse cannot be reached in the presence of unremedied unfair labor practices.'' *Circuit-Wise*, 309 NLRB 905, 918 (1992). Here, the negotiations foundered in part because of the Respondent's unlawful refusal to bargain about the elimination of COLAs and the elimination of voluntary overtime. Accordingly, I would find that the Respondent violated Section 8(a)(5) and (1) on October 10 when it unilaterally implemented its September 22 contract proposal in the absence of a valid impasse.[4]

[3] At the hearing, the Respondent argued that an unexpected downturn in its business operations during the late summer of 1994 necessitated its changed position on COLAs and voluntary overtime. The judge dismissed the Respondent's claim as an ''afterthought to excuse its unilateral withdrawal from tentative agreements,'' and the Respondent reiterates its position in its exceptions. It is unnecessary for me to resolve this issue. Assuming arguendo that the Respondent's new proposals in September were motivated by the changed business climate, the Respondent was still obligated to bargain over them. *Mercy Hospital of Buffalo*, 311 NLRB 869, 872 (1993) (''an employer's obligation to bargain with a union about mandatory subjects is not excused by economic expediency, even in good faith''). The Respondent does not contend that it was experiencing the kind of ''dire financial emergency'' that the Board has held may excuse bargaining altogether. See *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995).

[4] I cannot agree with Member Hurtgen's assertion that the Respondent's improvement of its overtime proposals and its offer of wage increases on November 9 cast a different light on its earlier outright refusal to bargain. The Respondent refused to bargain over the elimination of COLA and overtime in September and October. On October 10 it declared impasse and unilaterally implemented its proposal. Negotiations resumed thereafter on November 9. Postimplementation movement on proposals is irrelevant to the question whether earlier conduct regarding those items was unlawful. Further, the earlier refusal to bargain remained unremedied on November 9. Thus, I would conclude that, notwithstanding an improvement in its offer on that date, in the presence of a serious, unremedied unfair labor practice, good-faith bargaining could not occur. Accordingly, I would find that the Respondent further violated the Act on November 21 by locking out the unit employees and thereafter replacing them, all in furtherance of its own unlawful conduct.

Valerie Ortique-Barnett, Esq., for the General Counsel.
Harry J. Secaras & Howard L. Bernstein, Esqs. (Kattin, Muchin & Zavis), of Chicago, Illinois, for the Respondent.
Thomas D. Allison, Esq. (Allison, Slutsky & Kennedy PC), of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge. This case was tried in Chicago, Illinois, on July 31, August 1 and 2, and on October, 7, 8, 9, and 10, 1996. Upon a charge filed on November 30, 1994[1] by Chicago Local No. 458–3M of the Graphic Communications International Union, AFl–CIO (referred to as Local 458), the Regional Director for Region 13 issued a complaint on February 29, 1996, and an amendment to the complaint on April 24, 1996. The complaint, as amended, alleged that White Cap, Inc. (referred to as White Cap) had violated Section 8(a)(5) and (1) of the National Labor Relations Act (referred to as the Act) by engaging in bad-faith bargaining with Local 458, which included regressive bargaining and implementing collective-bargaining proposals prior to reaching a good-faith impasse. The amended complaint also alleged that White Cap had violated Section 8(a)(5), (3), and (1) of the Act by locking out its bargaining unit employees and hiring replacements for them. In its answers to the complaint and the amendment to the complaint, White Cap has denied that it committed the unfair labor practices alleged in this case.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, respectively, by the General Counsel, Local 458,[2] and White Cap, I make the following

FINDINGS OF FACT

I. JURISDICTION

White Cap, a corporation, manufactures metal and plastic bottle and container closures at its facility in Chicago, Illinois, where it annually derives gross revenues exceeding $500,000 from its business operations, annually purchases and receives goods valued in excess of $50,000 directly from points outside the State of Illinois, and from where it annually sells and ships goods valued in excess of $50,000 directly to points outside the State of Illinois. White Cap admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. White Cap also admits, and I find, that Local 458 is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND AND ISSUES

White Cap, a wholly owned subsidiary of Continental Can Europe, manufactures metal and plastic caps for beverage and food containers at four facilities in the United States. Three of those facilities, at Hazelton, Pennsylvania, Hayward, California, and Chicago, Illinois, make metal caps. The fourth, at Champaign, Illinois, produces plastic caps. This case concerns 31 lithographic production employees who do the printing on the metal caps produced at White Cap's Chicago plant, which employs approximately 700 employees. Of these 700, only the 31 lithographic production employees have a union representing them for purposes of collective bargaining. Since about the 1970's, White Cap has recognized Local 458 as the exclusive collective-bargaining representative of the following appropriate unit at its Chicago plant:

> All employees performing lithographic production work in the classifications listed in appendix A of the collective bargaining agreement, effective from May 1, 1991 until April 30.

White Cap's recognition of Local 458 as the representative of this unit has been embodied in successive collective-bargaining agreements, the most recent of which was effective from May 1, 1991, to April 30.

The circumstances which resulted in the amended complaint in this case began late in 1993. White Cap had installed a 6-day workweek and a 12-hour day in the Hazelton plant's lithograph operations and on a plant-wide basis at its Hayward and Champaign facilities. White Cap determined that with these changes, it had obtained increases in production time, had more employees available for overtime, and had improved efficiency in the production process by decreasing the number of shift changes. White decided to change its Chicago operations from the 5-day, 37-1/2-hour workweek and the 7-1/2-hour workday, which was then in effect at that facility and in the lithographic bargaining unit.

In November 1993, White Cap contacted Local 458 and set up a meeting on December 1, 1993, to present a proposal for a 12-hour day and a 6-day workweek. White Cap's intention was to reopen the existing collective-bargaining agreement and modify it to permit the imposition of the new work schedule by January 31, 1994. White Cap's proposal included economic provisions The parties held a second meeting on December 13, 1993, at which White Cap offered further explanation of the 6-day workweek. Local 458 proposed inclusion of White Cap's proposal in negotiations for a new collective-bargaining agreement to be effective on May 1. White Cap agreed. In January, the parties entered upon negotiations for new collective-bargaining agreement.

The parties continued to negotiate without achieving an agreement. The bargaining unit employees repeatedly rejected the proposed 12-hour day and 6-day workweek. On October 10, White implemented its last contract proposal, made on September 22, including the 12-hour day and the 6-day workweek. On November 9, White made a further contract proposal which included those two provisions. Four days later, the bargaining unit rejected this proposal.

On November 21, White Cap locked out the bargaining unit. The lockout continued until October 16, 1995. In February 1995, White Cap began seeking replacements for its locked out bargaining unit employees. By summer of that year, White Cap had hired about a dozen replacements.

The issues presented in this case are whether White Cap violated:

1. Section 8(a)(5) and (1) of the Act by

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[1] All dates are 1994 unless otherwise indicated.

[2] In its posthearing brief, Local 458 urges me to find that White Cap violated Section 8(a)(5) and (1) of the Act by repeated and unwarranted delays in scheduling negotiating meetings. However, the amended complaint does not include such an allegation. Nor did the General Counsel's brief seek this additional finding of unlawful conduct. As the General Counsel determines the legal theory in unfair labor practice cases, and as White Cap's responsibility for the delays in its negotiations with Local 458 was not litigated, Local 458's additional contention is not before me. *Kimtruss Corp.*, 305 NLRB 710, 711 (1991).

(a) engaging in regressive bargaining,

(b) imposing unreasonable contract ratification deadlines on Local 458, and by

(c) unilaterally imposing the terms of a proposed collective-bargaining agreement prior to reaching an impasse;

2. Section 8(a)(5), (3), and(1) of the Act by locking out its unit employees and hiring replacements.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

December 1993

White Cap's bargaining committee consisted of Anita Loch, vice president, human resources, Dan Dowling, operations manager, Cheryl Locke, manager, human resources, and Ed Woltersdorf, production supervisor (lithograph department). Local 458's bargaining committee included its Vice President Richard Catalano, Business Representative Bob Miller and a steward, Tom Pytlarz. Cheryl Locke and Richard Catalano were the leading negotiators for their respective sides. At this first meeting, Dowling and Locke reviewed White Cap's proposal for changes in the length of the workday and the workweek. The unit employees would work on one of two 12-hour shifts, 7 a.m. to 7 p.m., or 7 p.m. to 7 a.m., either Monday, Tuesday, and Wednesday, or Thursday, Friday, and Saturday. White Cap sought modification of the existing collective-bargaining agreement to allow implementation of its proposal by January 31.[3]

Locke explained to Local 458's representatives the benefits which White Cap expected to realize from the proposed changes in the workday and workweek. She told of the reduced overtime resulting from the sixth day of straight time work and of the increased production resulting from the reduction in the number of shift changes. Instead of the existing three shifts per day, the proposed changes would call for only two shifts per day.

Dan Dowling presented proposed schedules and initial crew assignments and explained the benefits the proposed changes would afford the unit employees. These included 4 days per week off, less time working, fewer commutes, more opportunities to volunteer for overtime, more day-shift employees, and 7 days off every other flip between the Monday to Wednesday and the Thursday to Saturday schedules. Dowling presented a schedule showing the worked hours and paid hours for the coming calendar year under the proposed changes.

At the meeting of December 1, 1993, Dowling and Locke presented a written proposal setting out provisions designed to implement a 12-hour day and 6-day week in the bargaining unit by January 31. The written proposal included two 15-minute breaks during the workday, an increase of 5 minutes per break over the current collective-bargaining agreement provision. Further proposed changes included 40 hours' pay per week for 36 hours of straight time work, overtime paid at time and one-half for hours worked in excess of 12 hours on any day, or in excess of 36 hours in any week, double time for hours worked on Sunday, holiday pay increased from 7.5 hours to 8, a night-shift differential of $.80 per hour, vacation pay increased from 37.5 hours to 40 hours, and severance pay increased from 37.5 hours to 40 hours. The parties agreed that Local 458 needed some time to review the material which White Cap had presented at this meeting. They scheduled their next meeting for December 13, 1993.

White Cap and Local 458, represented by their respective negotiating teams, resumed discussions of the 12-hour day and the 6-day week on December 13, 1993. Local 458 raised questions about how White Cap would treat days off because of sickness. The fear expressed was that an employee who took one sick day would lose one third of his or her week's pay. Local 458 also expressed concern about older unit employees having to work 12-hour days during warm weather.

Dan Dowling gave a detailed explanation of White Cap's proposed 12-hour day and 6-day workweek. Dowling presented the same explanation he had recently given to nonunion White Cap employees. He told of the benefits White Cap expected to realize from the proposed changes. Dowling also recited the benefits to the unit employees if they embraced 12-hour day and the 6-day week. Local 458's representatives asked questions and expressed concerns. Dowling sought to answer them and allay their fears. Dowling rejected the idea of permitting unit employees to remain on a 5-day schedule, while switching the rest of the Chicago plant to the 6-day week.

Late in the meeting, Cheryl Locke asked what the next step would be in the process of obtaining Local 458's consent to White Cap's proposal. Richard Catalano's suggested that the better course was to negotiate a complete, new contract to include White Cap's 12-hour day and 6-day week. Catalano also said he saw nothing negative in White Cap's proposal and urged settling the new contract by January 31, or February by the latest. After a brief caucus, White Cap agreed to begin negotiations for a new contract in January. The parties agreed to hold four negotiating sessions in January. Toward the end of the meeting, Catalano asserted that the date of the new collective-bargaining agreement would be April 30.

The parties also agreed that Dan Dowling would meet with each of the three shifts of unit employees and explain White Cap's proposed changes in their work schedules. A representative of Local 458 would begin each meeting with 30-minute talk. These meetings took place at White Cap's Chicago plant on December 16, 1993. Local 458's Vice President Catalano and Business Representative Miller were present for them and heard Dowling's presentation

January

A meeting scheduled for January 5 did not occur. Instead, the parties met for negotiations on January 7. The management bargaining committee remained the same. Local 458's President, Charles Timmel attended with Catalano and Tom Pytlarz. Business Representative Miller was absent from this meeting.

The parties did not present any contract proposals at this session. Instead, they continued to discuss White Cap's plan for a 12-hour workday and a 6-day workweek. Local 458 expressed concern that under White Cap's plan, unit employees

[3] My findings regarding the parties' discussions in December 1993 and their negotiations in 1994, were based upon the testimony of participants, the minutes taken by White Cap employee Ann Chaplin, and Bob Miller's and Richard Catalano's notes. Except as noted below, there were no issues of credibility in this case.

who took 1 day of sick leave would lose one-third of a week's pay. There was a discussion of using vacation time as sick leave. The parties discussed how crew members might switch shifts with members of other crews when personal problems arose, and how management would pick crews. Also there was a discussion of overtime problems and other problems arising from the 6-day week. The parties also discussed White Cap's proposed modifications in its time and attendance policy.

Another topic of discussion was White Cap's health and welfare contributions. White Cap agreed to pay an increase as of the contract's effective date, but not retroactively. White Cap added that it was willing to talk about the matter. White Cap requested that Local 458 prepare a formal contract proposal for the next negotiating session to be held on January 11.

The parties' negotiations resumed on January 11. The same committee appeared for White Cap. Local 458's business representative, Miller attended. President Timmel did not. Vice President Catalano distributed copies of Local 458's contract proposal dated January 10. Local 458's proposal said nothing about a 12-hour workday or a 6-day week. Local 458's proposals included a 3-year term, beginning on May 1, a 5-percent wage increase, an additional holiday, retention of night-shift deferential when White Cap transferred a unit employee to the day shift during a regular workweek, double-time for work performed before or after the regular uniform starting time of a shift, improvements in the existing bereavement provision, and, a monthly increase of $50 per unit employee in White Cap's health and welfare contributions. There was discussion of Local 458's proposals and other topics of mutual concern. The negotiating committees agreed to meet next on January 13.

When the negotiating committees met on January 13, Cheryl Locke thanked Local 458 for its contract proposal, and then explained why a 6-day week in the lithographic operation was so important to White Cap. Locke discussed White Cap's increased competition from other producers, whose prices for caps were from 10 to 17 percent lower than White Cap's and whose quality was better than White Cap's. She described White Cap's efforts to improve efficiency and reduce costs and included the 6-day week as one of the changes designed to accomplish those objectives. Locke asserted that the 6-day offered the best prospect for improving the Lithographic Department's production and efficiency.

Locke presented White Cap's initial proposal for a new 3-year collective-bargaining agreement to become effective on March 1. Article 10.1 of White Cap's proposed agreement provided for a 6-day workweek, Monday through Saturday, with two 12-hour shifts and four crews working regularly, 3 days on and 4 days off. The crews would work alternate schedules every 2 months, with an additional change at midyear. White Cap's contract proposal also included retention of cost of living adjustments, as in the previous collective-bargaining agreement, 40 hours' pay for 36 hours of regularly scheduled work, 8 hours of pay for each holiday listed in the contract, time and one-half pay for all hours worked in excess of 36 per week, and a night-shift differential of 80 cents per hour for press operators, press feeders and apprentices, and 65 cents for press mechanics, millwrights, and oilers. Also, under its proposed contract, White Cap would agree to a monthly increase of $50-per-unit employee in its contributions to the health and welfare fund. White Cap's proposed contract retained the voluntary overtime provision which was in the expiring contract.

The parties discussed the matter of wage increases. White Cap's contract proposal called for no wage increases during its term, but did have a COLA provision. Cheryl Locke and her colleagues argued that COLAs were wage increases. Local 458's representative disagreed. White Cap rejected the notion of double time for overtime favored by Local 458.

Local 458 expressed fears regarding the 12-hour day. One such concern was the possibility that White Cap would require unit employees to work in excess of 12 hours on a shift. White Cap assured Local 458 that no such requirement was contemplated, as such overtime would impair safety, productivity, and quality.

The parties devoted the balance of their negotiations on January 13, to provisions of White Cap's contract proposal. I find from Vice President Anita Loch's testimony that the health and welfare provision received considerable attention from the parties during that session, and that White Cap agreed to make the increased payment set forth in its contract proposal ''in the hope of moving us along and not having a major bone of contention with the union.'' I also find from Loch's testimony that on January 13, Local 458 advised White Cap's bargaining team that a wage increase was necessary to sell the 12-hour day and the 6-day week to the unit employees.

Before the parties adjourned, Local 458 said it would be talking to its members on January 18 and 19. The parties scheduled their next negotiations for January 19. On January 17, White Cap faxed a summary of its contract proposal to Local 458.

The parties' next negotiating session was on January 24. At this session, Catalano reported that Local 458's members required a long time to digest the proposed 12-hour workday and the 6-day workweek. He asserted that the membership had questions about the 12-hour day and ''are not grasping it.'' Catalano again warned that the unit employees were looking for a wage increase, but that he sensed a positive reaction to White Cap's proposed changes in the work schedule.

Catalano presented Local 458's counterproposal, which reduced its demand for wage increases from 5 percent to 4-1/2 percent for pressmen and press mechanics A and B, and 4 percent for feeders. Local 458's counterproposal also sought two times the hourly wage for hours worked before or after the regular uniform starting time of a shift, an additional holiday, the addition of sister-in-law and brother-in-law to the bereavement provision, and an 80-cent night-shift differential for all unit employees. I find from Catalano's testimony that during negotiations on January 24, Local 458 was bargaining on the basis of a 12-hour day.

White Cap prepared a summary of the negotiations which occurred on January 24, showing that White Cap had agreed to pay double time for hours of work in excess of 12 per day, and time and one-half for hours of work exceeding 36 in 1 week, and an 80-cent night differential for all unit employees. White Cap repeated its agreement to increase its monthly contribution to health and welfare by $50 per unit employee. White Cap also agreed to add sister-in-law and brother-in-law to the bereavement provision. Local 458's counterproposal had dropped its demand for an extra be-

reavement day for attending family funerals located more than 500 miles away. White Cap faxed this summary to Local 458 on January 27.

Before adjourning the negotiations, the parties agreed to resume on February 4. They also agreed that White Cap would hold an meeting with the unit employees to further inform them about the contemplated 12-hour day and 6-day week.

February

On February 1, Dan Dowling and Cheryl Locke, in the presence of Catalano and Miller, spoke to a group of bargaining unit employees, in White Cap's lithographic cafeteria, about the 12-hour day and the 6-day week. Dowling did most of the talking, explaining how the new schedule would work and how it would benefit the employees. He assured his listeners that overtime would be voluntary under the new system.

At the next negotiations, on February 4, White Cap sent only Locke, Dowling, and Ed Woltersdorf to the table. Catalano, Timmel, and Pytlarz represented Local 458. Catalano presented a new contract proposal from Local 458, which was based upon a 6-day workweek, and which reduced Local 458's earlier wage demands to 3-1/2 percent for pressmen, press mechanics, and oilers, and 3 percent for feeders. The new proposal did not include an additional holiday. White Cap rejected the proposed wage increases and insisted that a COLA was a wage increase. Later in the meeting, Local 458 proposed a 2.5-percent wage increase for pressmen, press mechanics, and oilers, effective September 1, a $15 weekly wage increase for feeders, effective on the same date, a $300 dollar lump-sum bonus to all unit employees in 1995, and a repetition of the 1994 increases in 1996. Local 458's proposal also attempted to deal with the issue of foreign work.

Catalano urged White Cap to offer a wage increase and retain COLA if it wanted the unit employees to accept the 12-hour day and the 6-day week. Locke answered that the wage issue was important and tough for White Cap. She added that White Cap wanted the contract resolved in the following week and looked for a positive vote. The parties agreed to meet next on February 9, and also on February 11.

Anita Loch returned to the bargaining table on February 9, along with Cheryl Locke, Dan Dowling, and Ed Woltersdorf. Richard Catalano, Bob Miller, and Tom Pytlarz was present for Local 458. The parties continued to spar over the wage issue. White Cap insisted that its effort to cut costs would suffer if it granted a wage increase to the unit employees, while a wage freeze was in effect for its nonunion employees. Locke contended that COLA was sufficient. Local 458 suggested that the unit employees might support the work schedule proposal if White Cap granted a one-time signing bonus. White Cap offered a one-time lump-sum bonus of one week's pay, which would amount to 41.25 hours' pay, to be given to the unit employees when the 6-day week went into effect for them. White Cap insisted that this was the best they could do. Local 458 pressed for more money. White Cap remained fixed on its offer.

Local 458 agreed to submit White Cap's contract proposal, including its bonus offer, to the unit employees for a vote. However, Catalano said the bonus was inadequate and that the bargaining committee would leave the matter of approval wholly up to Local 458's members. He did not agree to endorse it and was not encouraging as to the outcome of the vote. After the meeting, White Cap faxed a summary of its last contract proposal to Local 458. The summary included maintenance of COLAs for the next 3 years and the signing bonus of 1 week's pay.

On February 12,[4] Local 458 put White Cap's proposed collective-bargaining agreement to a vote by its members. The unit employees rejected the proposal by a large margin. Miller and Catalano explored membership sentiment and found that the number one reason for rejecting the proposal was wages. Loss of overtime under the 12-hour day and the 6-day week were also major causes of the negative vote.

Two days after the vote, Catalano phoned the result to Cheryl Locke. The parties agreed to meet on March 15 and discuss the employees' rejection of White Cap's proposal.

March

The parties met on March 15. Cheryl Locke thanked Local 458 for coming to the meeting to explore where the parties were in the bargaining process and provide its thinking. Cheryl Locke and Rich Catalano reviewed the voting process and Local 458's effort to explain White Cap's contract proposal. Catalano remarked that some of the members did not understand the 12-hour day. He also said that the absence of a wage increase proposal was an important factor in the negative vote. Locke noted that White Cap had made the best proposal it could, and had made concessions to obtain timely implementation of the 12-hour schedule. She also warned that the things White Cap had put on the table were not guaranteed. Locke detailed White Cap's plan to begin phasing in the 12-hour day and the 6-day week by mid-April. She reaffirmed White Cap's need for this schedule and its firm plan to put it into effect at its Chicago facility, including the Lithograph Department. White Cap also insisted that COLA s provided an adequate increase in the unit employees' wages and that it would not grant wage increases to them, in the face of a current company-wide wage freeze.

Shortly after the meeting of March 15, Cheryl Locke left White Cap. On April 11, White Cap hired Maxine Curtis as Locke's replacement, as both manager of human resources at its Chicago plant, and as its chief spokesperson at the negotiations with Local 458.

April

The parties resumed negotiations on April 22. Before getting on with discussions, Anita Loch announced that Bill Burke had replaced John Scales as White Cap's president and CEO. Maxine Curtis took over as chief negotiator.

Curtis asked Catalano if he had talked to Local 458's members after the negative vote. Catalano reported that Tom Pytlarz had polled them. The members wanted a wage increase and the fate of the 12-hour day was uncertain. Local 458 went on to assert that members feared the loss of double

[4] On direct examination, Bob Miller and Richard Catalano testified, with undertainty, that they took the vote on February 10. However, later on cross-examination, Catalano testified that the members voted on February 12. In an affidavit which Catalano gave to a Board agent on January 5, 1995, he gave February 12 as the date of the members' vote. I also noted that Catalano seemed more certain while testifying on cross-examination about this meeting. Accordingly, I have credited his testimony fixing February 12 as the date of the meeting.

time on Saturdays, and overtime under the proposed system, and that older members were worried about standing for 12 hours. Catalano reminded White Cap that Local 458 did not consider COLAs as wage increases. White Cap explained that under its proposed work schedule, the unit employees would annually receive pay for 208 hours which were not worked and thus surpass whatever double time they might have realized under the 5-day week. Local 458 proposed a 2-percent wage increase in the first year of the new contract, zero the second year, and a wage reopener for the third year, or 1 percent in the first year, 1 percent in the second year, and a wage reopener in the third year. White Cap said they would consider these proposals as an addition to the COLAs. At the same time, Curtis retracted the lump-sum payment which White Cap had offered in February.

The parties noted that the current collective-bargaining agreement would expire on April 30. They agreed to an extension agreement, which Catalano would prepare, and send to Curtis. They scheduled their next meeting for May 12.

On April 22, Local 458 sent an extension agreement to White Cap. The proposed agreement called for the extension of the expiring contract beyond April 30 ''for a reasonable length of time'' while negotiations were in progress and gave a retroactivity date of May 1, for ''any changes to the contract.'' Catalano and Miller signed the proposed extension agreement before sending it to Maxine Curtis. A few days later, Curtis phoned Catalano and said she would not agree to retroactivity and would draft a new extension agreement.

White Cap prepared an agreement extending the expiring collective-bargaining agreement on a day-to-day basis, with a 10-day termination notice provision, and no retroactivity. White Cap signed it on April 29 and Local 458 signed it on May 4.

May

On May 9, White Cap distributed a letter from its President and CEO, Bill Burke, to its nonunion employees. The letter reported on White Cap's efforts to remain competitive, outlining a global strategic plan and reporting that its sales and financial health had improved over the ''past 6 months.'' Burke expressed cautious optimism ''that we will see this progress continuing during the upcoming months.'' Continuing, Burke, announced: ''As a result, we will be lifting the wage/salary delay for all salaried and non-union hourly employees.'' The letter also stated that ''spending for employee activities and various other discretionary items will be restored.''

Vice President Catalano received a copy of Burke's letter at an informational meeting, which Dan Dowling conducted for the bargaining unit employees on May 10. Dowling talked about the 12-hour day and the 6-day week, and answered the employees' questions about these proposed schedule changes. Dowling conducted two such meetings on that day. Catalano polled the unit employees after Dowling's presentation and found that two-thirds of the employees favored these changes, if they also received a wage increase.

White Cap and Local 458 resumed negotiations on May 12. Catalano said he wanted to wrap up negotiations and settle the contract during the coming weekend, at a membership meeting. Maxine Curtis said White Cap was open to a 1- or 2-percent wage increase in the first year but no wage reopener in the third year. Curtis wanted to discuss Local 458's last wage proposal and the comfort level, or the lack of it, regarding a favorable vote from the employees on the coming Saturday. Local 458 complained that President Burke's letter had convinced the unit employees that White had money for a wage increase greater than 2 percent. Richard Catalano and Bob Miller asked White Cap to agree to a 2-percent wage increase in the contract's first year and an added 1 percent in the contract's third year. White Cap did not want to agree to any wage increase until it was sure that the unit employees would vote for the 12-hour day and the 6-day workweek. Curtis agreed to consider Local 458's latest wage proposal, and, after costing it out, to get back to Local 458.

White Cap's negotiators began discussing the impact of the added 1 percent on provisions which it had proposed. Anita Loch explained that White Cap had dollar limits on their bargaining. She went to say that White Cap might change many of the sweeteners previously offered. Dan Dowling said that the added one percent would impact on benefits such as holiday pay and vacation pay. Anita Loch suggested that Local 458 use its next membership meeting, on the coming Saturday, to explain the remaining issues to the unit employees. The parties scheduled their next bargaining session for June 6.

June

At White Cap's request, the next bargaining session was postponed to June 13. At that session, White Cap presented a new proposed collective-bargaining agreement. White Cap distributed copies of its proposal of February 9. Whereupon, Maxine Curtis presented the changes which White Cap would make to that proposal. The 12-hour day and the 6-day week and COLA were unchanged. However, White Cap was now offering a 2-percent wage increase effective August 1, 1994, no increase in 1995, and a 1-percent increase effective August 1, 1996. Further, the new proposal included a signing bonus of one week's pay if the 6-day week went into effect on July 11, but no bonus if the 6-day schedule did not go into effect until September 12. However, the new proposal reduced some of the benefits which White Cap had offered in its proposal of February 9. Anita Loch reminded Local 458's committee that they had emphasized the importance of a wage increase. Maxine Curtis asked if Local 458 needed time to study this proposal. Local 458 said it did, and caucused.

Local 458's review of White Cap's latest proposed collective-bargaining agreement revealed that 1 week of paid vacation and severance pay had been reduced from 40 hours to 37.5 hours, and paid holidays had been reduced from 8 hours to 7.5 hours. These reductions brought these benefits back to their respective levels under the extended collective-bargaining agreement. Local 458 returned to negotiations and warned that these reductions would cause the members to reject this proposed agreement and urged restoration of the vacation, severance and holiday pay to the levels in White Cap's contract proposal of February 9.

White Cap heeded Local 458's arguments and produced a new proposed collective-bargaining agreement. One week's vacation pay would be 40 hours and holiday pay would be 8 hours. The new proposal did not include the signing bonus and required implementation of the 12-hour day and the 6-day week on July 11. Local 458's negotiators believed the

new proposal was excellent and announced that they would recommend it to the unit employees.

Local 458 conducted a meeting on Fathers Day, June 19 at which its negotiating team explained and recommended White Cap's proposed collective-bargaining agreement to the 24 unit employees in attendance. In a secret ballot, 9 voted for the agreement and 15 rejected it. Early on June 20, Vice President Catalano phoned Maxine Curtis and told her that the employees had rejected White Cap's proposal. Catalano reported that he had polled the employees after the vote and found opposition to the proposal was due to a fear of losing overtime wages under the 6-day week.

On June 24, Maxine Curtis, on White Cap's behalf, faxed a letter to Vice President Catalano, which contained the following:

> We are greatly disappointed and frustrated by the most recent rejection of [White Cap's] contract proposal.
>
> As you know, *solely in order to get acceptance* of our offer—an offer that was already very generous—we added or improved several items. Those items were added only after repeated assurances from you and your committee that our increased offer would satisfy your members' needs.
>
> Perhaps the latest rejection is an indication that (a) continued rejection will lead to further increases by [White Cap], (b) continued rejection will cause [White Cap] to back off of its planned conversion to 12-hour scheduling, or (c) at the least, there is nothing to lose.
>
> I urge you to convey to your members in the strongest possible terms that:
>
> 1. [White Cap] *absolutely will not* make any further improvements to its proposal.
> 2. [White Cap] *will not* back off of its plans to convert to 12-hour scheduling.
> 3. They *do* have something to lose.
>
> We cannot let this matter continue in its present state. Our goal remains a fair agreement (fair to *both* sides) implemented in time to be of real value. Therefore, we urge you to resubmit our offer to your membership *immediately* with the strongest possible message that it will *not* be improved.
>
> As further incentive to ratify our offer, *if our offer is not ratified by Friday, July 1st,* the following items *will be withdrawn from our proposal*:
>
> 1. Two percent wage increase effective August 1, 1994
> 2. One percent wage increase effective August 1, 1996
> 3. Proposal to compute overtime after 36 hours
> 4. Proposal to pay vacation pay at 40 hours
> 5. Proposal to pay holiday pay based on 8 hours pay
> 6. Proposal to increase health and welfare contribution by $50.00 per month.
>
> We sincerely hope that our offer *will* be accepted and the withdrawal of these beneficial items will not be necessary. However, [White Cap] is firmly committed to the proposed scheduling changes as a necessary component of our business plan for 1994 and beyond.
>
> If you have any question about [White Cap's] position or the action we will take if our offer is not accepted by July 1st, please give me a call.

Catalano phoned Curtis on June 27 and expressed disappointment with her letter. Catalano also protested that her July 1 deadline did not afford enough time for Local 458 to hold a membership meeting, particularly because of the July 4th holiday. He said he could not get all of the unit employees together during the time afforded by the July 1 deadline. Catalano reminded Curtis of the bad results from the recent meeting on Fathers Day. During this conversation, Catalano objected to White Cap's threatened withdrawal of its proposal to increase monthly health and welfare payments by $50. He also suggested conversion of only part of the bargaining unit employees to the 12-hour day. Curtis rejected this idea and insisted on the July 1 deadline. Catalano said he had to contact his committee, and the conversation ended.[5]

On Wednesday, June 29, Catalano again phoned Curtis seeking an extension of the deadline until July 10, when he could hold a meeting with Local 458's members. According to Catalano, Curtis agreed to extend the deadline to July 3. However, Curtis testified that she extended the deadline until 7 a.m. on July 5, the first workday after the long weekend. Curtis's notes, made at the time of this conversation, show an extension until July 5. In light of this corroboration and the certainty with which she testified about this matter, I have credited Curtis, and find that 7 a.m., on July 5, was the new deadline. Curtis told Catalano that ''[White Cap was] seriously being jeopardized on a business standpoint.''

On June 30, at Catalano's request, Local 458's President Timmel telephoned Curtis. With Catalano listening on an extension, Timmel suggested that the parties have a negotiating session on July 5, followed by a ratification vote at White Cap by Local 458's members. He also suggested bringing employee Bill Bragg to the negotiations. Curtis answered that White Cap's committee would be glad to talk to Bragg. She refused to extend the July 5 deadline. The conversation ended.

In the afternoon of the same day, Curtis phoned Timmel after conferring with her bargaining committee. Timmel advised her that Local 458 would not have a membership meeting during the July 4th weekend. Curtis reminded Timmel that the July 5 deadline was fixed and that White Cap intended to make the changes set out in its letter of June 23. However, she did not respond to Local 458's request for a meeting on July 5.[6]

July

On July 7, Catalano phoned Curtis and said that Timmel had expected to hear from her on July 5. Curtis questioned Timmel's expectation, and pointed out that she had left it up to Timmel to obtain ratification of White Cap's proposal over the weekend and ''if not, our letter stands.'' Catalano

[5] I based my findings of fact regarding Catalano's and Curtis's conversation on June 27, upon Catalano's testimony and her notes taken during the conversation.

[6] My findings regarding Curtis' conversations with Timmel on June 30, are based upon her testimony which was substantially corroborated by her notes. I also noted that Curtis testified about these conversations in a frank manner.

suggested that the parties have one more meeting on July 12 or 13, before Timmel left on vacation. Curtis said she would get back to Catalano after checking with Anita Loch, Dan Dowling, and Ed. Woltersdorf.

On the following afternoon, Curtis called Local 458 and spoke to President Timmel. She told him that Dan Dowling had resigned as plant manager, and that this factor, together with the absence of an operations manager and White Cap's imminent implementation of the 6-day week among the nonunion litho group employees prevented further meetings for sometime. Timmel remarked that it would not hurt to let negotiations rest for a while. Curtis and Timmel also discussed Local 458's plan to bring a unit employee to the bargaining table. They did not reach an agreement on this matter. Timmel said that that he would raise this issue again if and when Local 458 decided to have a unit employee join its bargaining committee.

September

The parties resumed negotiations on September 14. Acting Plant Manager Roger Nagy replaced Dan Dowling on White Cap's negotiating team. He joined Maxine Curtis, Anita Loch, and Ed Woltersdorf. Richard Catalano, Bob Miller, Tom Pytlarz, and employee Bill Bragg represented Local 458. Bragg opposed to the 12-hour day and the 6-day week. Local 458 brought him to the negotiations to give him an opportunity to hear about these proposed changes from White Cap's negotiators and to obtain his support for them.

At this meeting, Curtis, referring to a position paper, which White Cap's negotiating committee had prepared and entitled ''Rationale-Company Position,'' sought to explain the factors influencing White Cap's bargaining tactics. Curtis began by expressing disappointment at the absence of an agreement after 10 months of negotiations. She complained of no cooperation from Local 458's membership. Curtis reaffirmed White Cap's firm commitment to the 12-hour day. She continued:[7]

> We sweetened the proposal solely in order to convince you of the 6-day operation in early 1994. We would not have ordinarily put them on there. There has been a severe impact on our operations. We have lost productivity with overtime scheduling—$25,000 a month, a $100,000 loss. We have had to shut down lines and find alternatives to the work with outside sources. It caused an imbalance between Litho union and nonunion. It certainly had an impact on our customer deadlines. It added up to costs we have to recoup in any contract.

Curtis's further remarks during this meeting included complaints of eroding profit margins due to shutting down production lines and pricing pressures from its number one and four customers requiring White Cap to reduce its prices by 7-10 percent. Curtis remarked: ''It is very different than several months ago.'' She repeated White Cap's disappointment with Local 458's members, saying: ''We felt the membership should have said yes.''

Before announcing changes in White Cap's contract proposals, Curtis reminded Local 458 of her letter of June 23, as follows:

> The Company is committed to the 12-hour day. This is not a game. In June you had a vote and turned the contract down. We sent a letter to you, and it did tell you we have had placed things in that proposal, that we added several increases and, in that proposal, we did forwarn you if we did not have an agreement, several things would be withdrawn. We are holding to the letter. It was put in black and white to make you understand. By Friday, July 1st, if an agreement was not reached, we would withdraw the items listed.

Upon completing the quoted statement, Curtis announced the following changes in White Cap's proposal of June 13:

1. Withdrawal of the wage increases.
2. Termination of COLA's.
3. Overtime to begin after 40 hours instead of after 36.
4. Change double time after 12 hours of work to time and one-half.
5. Reduce the night-shift differential from $.80 to $.40.
6. Reduced holiday pay from 8 hours to 7.5 hours.
7. Reduce vacation pay from 40 hours to 37.5 hours per week.
8. Instead of a $50/month increase in health and welfare payments per employee, effective from the inception of the new contract, White Cap would pay an increase of $20/month the first year, an added $15/month the second year and another $15/ month increase at the inception of the third year of the new contract.
9. Deletion of voluntary overtime provision.

Curtis asked Catalano if he had any questions. He said no. I find from White Cap's minutes of September 14 that Curtis told Local 458's representatives: ''The letter in June was not a scare tactic. This is serious business.''

The next bargaining session occurred on September 22. Local 458 presented a written proposed 2-year collective-bargaining agreement based upon a 37-1/2-hour week and a 7-1/2-hour workday. White Cap rejected the proposal and presented a counterproposal. Later in the meeting, Catalano proposed a 1-year contract based on the 5-day, 37-1/2-hour week. He suggested that during the 1 year contract term, the unit employees could observe the operation of the 6-day week elsewhere in the Chicago plant, and several of the older employees, who opposed the 12-hour day, would retire. White Cap rejected this proposal.

Toward the end of the bargaining session on September 22, White Cap distributed a proposed collective-bargaining agreement embodying the terms announced at the bargaining session on September 14. White Cap inscribed circles in the margins next to all but four provisions in its proposed agreement. Maxine Curtis told Local 458 that the items circled were White Cap's final positions and that there would be no movement on them. These items included termination of

[7] My findings regarding Maxine Curtis's remarks at the bargaining meeting of September 14, are based upon her testimony, Anita Loch's corroborating testimony, and White Cap's minutes of that meeting. Robert Miller's notes for the meeting of September 14, which I received in evidence, are sketchier than White Cap's. However, Miller's notes corroborated the substance of White Cap's minutes which were the work of Ann Chaplin, who was present for all the negotiations involved in this case.

COLA, mandatory overtime, and, overtime payments of time and one-half for hours worked in excess of 12 hours in one day or 40 hours in one week. Curtis also said that there were four provisions which were unmarked and, thus, open for negotiations. The four unmarked provisions concerned wages, vacation, holidays, and night-shift differential.[8] The parties agreed to meet next on October 4.

By letter of September 26, to Local 458, White Cap announced the termination of their extension agreement effective at 12:01 a.m., on Friday October 7. The letter pointed out that with the expiration of the extension agreement, the parties were ''free to use all economic recourse permitted by law, including but not limited to the right to strike or lock out.''

October

White Cap and Local 458 met on October 4. Attorney Howard L. Bernstein joined White Cap's bargaining committee along with Loch, Curtis, Nagy, and Woltersdorf. Catalano, Miller, Pytlarz, and employee Bill Bragg constituted Local 458's bargaining committee.

Curtis asked if Local 458 had anything new to present. Catalano said no and began talking about a Federal mediator. He asked if Federal Mediator Jim Shephard had contacted White Cap. Curtis asked what Catalano expected to change by having a mediator. Catalano answered in substance that a third party might bring about an agreement between White Cap, and Local 458. Curtis rejected mediation as a waste of time and added that there had been enough delay. Catalano remarked that the unit employees had rejected the 12-hour day, no matter how Local 458 had tried to persuade them to accept it. Local 458 did not offer any counterproposal and insisted that it had submitted its own proposal which remained on the table. Curtis reminded Local 458 that there were three or four issues open for negotiation. Catalano complained that White Cap had taken COLA off the table. Curtis asked if there was a counteroffer. Catalano replied: ''No. There is nothing to counter.'' Curtis responded, saying that White Cap's proposed collective-bargaining agreement which it had presented on September 22, was its last offer. Catalano asked if White Cap intended to implement this proposal on October 7. Curtis replied: ''We are holding our options open.''

During the discussions on October 4, employee Bill Bragg, who was sitting with Local 458's negotiating committee, complained that Dan Dowling had misled the unit employees into believing the 12-hour day was a voluntary option for them. According to Bragg, Dowling told the unit employees, at meetings, that the 12-hour day would afford them more time to spend with their families or pursue pastimes such as hunting and fishing. However, Bragg asserted, Dowling said the unit employees were free to accept or reject the 12-hour day.

After White Cap's negotiators had left the meeting, Local 458 asked them to return. Catalano asked Curtis about mediation. She again rejected it. Catalano again asked if White Cap intended to implement its last contract proposal. Curtis answered that White Cap was reviewing its options. Catalano asked her if the parties had reached an impasse. Curtis replied: ''[W]hat do you think, Rich?'' Catalano posed the same query to Attorney Bernstein, who answered that ''as a third party observer, I believe you're there.'' The meeting ended without discussion, or selection of a date for further negotiations.[9]

On October 5, Maxine Curtis notified Local 458, by letter, that ''effective at the start of the first shift which will begin at 7:00 a.m. on Monday, October 10,'' White Cap would implement its ''last proposal regarding the six-day schedule.'' The letter also advised Local 458 that at the same time, White Cap would implement its ''final proposals as proposed on September 22, 1994, over which we are deadlocked.'' In reaction to this letter, Local 458 held a meeting on October 8, at which Catalano informed its membership of White Cap's intentions. The membership voted 24 to 5 to accept White Cap's proposal of June 13, including the 12-hour day and the 6-day week. Local 458 instructed its members to remain at work after White Cap imposed the 6-day week, the 12-hour day and its contract proposal of September 22.

On October 10, White Cap installed the 12-hour day and the 6-day week and implemented its last proposed collective-bargaining agreement. That same day, Catalano in a phone conversation with Curtis, told her that the membership had ratified White Cap's contract proposal of June 13. Curtis rejected the ratification, insisting that the proposal of June 13 was no longer on the table, and that the proposal of September 22 had replaced it. Catalano warned Curtis that Local 458 would take legal action against White Cap, including the filing of unfair labor practice charges. When Curtis sought an explanation of this warning, Catalano accused White Cap of regressive bargaining. He said that Local 458 would not accept White Cap's proposal of September 22, which had no wage increase and no COLA. Also, on October 10, Catalano sent a letter to Curtis announcing Local 458's acceptance of the proposed contract of June 13. By letter dated October 11, Curtis stated that White Cap had withdrawn its proposal of June 13 by its letter of June 23, and that the offer made to Local 458 on September 22 had replaced the earlier offer.[10]

November

At Local 458's request, the two negotiating committees met on November 9. Attorney Thomas D. Allison joined Local 458's Bob Miller, Richard Catalano, Bill Bragg, and Tom Pitlarz at this meeting. Attorney Howard L. Bernstein attended on behalf of White Cap, along with Anita Loch, Maxine Curtis, Roger Nagy, and Ed Woltersdorf.

Catalano began by urging return to White Cap's proposal of June 13. Curtis rejected any notion of returning to that proposal, which she said had been dead for a long time. Instead, White Cap presented a new written proposal which offered wage increases in the form of three lump-sum payments of 2 percent of base salary. The first payment was to be made within 30 days after ratification of the contract. Twelve months after the first payment White Cap would

[8] My findings of fact regarding the bargaining session on September 22, are based upon the testimony of witnesses Robert Miller, Richard Catalano, Anita Loch, and Maxine Curtis.

[9] My findings of fact regarding the bargaining session on October 4, are based upon White Cap's minutes and the testimony of witnesses Miller, Catalano, Bragg, Loch, Bernstein, and Curtis.

[10] My findings of fact regarding the conversations and other communications between the Catalano and Curtis on October 10 are based upon their testimony, Curtis's notes of their conversation, and the letters which passed between them on that date and on October 11.

make the second payment. The third installment would follow, 12 months after the second payment. White Cap also offered to pay 40 hours' wages for 1 week of vacation, and to grant 8 hours of pay for each paid holiday. Further, White Cap offered to increase its monthly contributions to the health and welfare fund by $50 per unit employee, upon contract ratification.

Local 458 asked White Cap to restore COLA, improve the wage increase to 2 percent the first year and 1 percent in the third year of the contract, raise the night differential to 80 cents and agree to voluntary overtime. Following a caucus, Maxine Curtis presented some improvements on White Cap's latest proposal. These included a modification of White Cap's overtime proposal. White Cap would agree that a unit employee would not be required to work 4 consecutive 12-hour days, that it would seek volunteers for 12 hours first, and then for 6 and 6, before requiring unit employees to work overtime, and that it would not force unit employees to work overtime on their day off. The night-shift differential would increase to 80 cents. There would be no COLA. The wage proposal was modified to provide a 2-percent lump sum upon ratification, a 2-percent wage increase 12 months later, and 12 months after that, another 2-percent lump sum. Curtis urged Local 458 to take this latest proposal to the employees for a vote during the coming weekend. Catalano asked if there was room for discussion. Curtis replied that this was ''our final offer.'' Local 458 caucused to ponder White Cap's proposal.

Local 458 returned and rejected White Cap's final offer. Catalano said Local 458 could live with White Cap's overtime proposal and accepted the 80 cent differential. However, he rejected the elimination of COLA, and suggested a freeze for the contract term. Curtis replied that COLA would be terminated. Catalano proposed no COLA, but a 2-percent annual wage increase for each of the contract's 3 years. Curtis said no to this. Following further discussion, White Cap agreed to make pension contributions based upon the lump-sum payments provided by its last offer. The meeting adjourned.[11]

On Sunday, November 13, Local 458's membership met and voted down White Cap's last offer. On the following day, Catalano notified White Cap of the employees' vote. On November 20, White Cap issued a lockout notice, effective against the bargaining unit employees immediately. The notice conditioned return to work upon Local 458's signing of White Cap's final offer and made clear that White Cap had no intention of changing it or increasing it. The lockout remained in effect from November 21 until October 16, 1995, when the parties executed a collective-bargaining agreement.

In February 1995, White Cap sought replacements for the locked-out bargaining unit employees. I find from Anita Loch's testimony that White Cap hired at least 12 replacements for the locked-out employees in 1995. The locked-out unit employees included the following:

Kenneth Altman	Stanley Kwak
Sotico Amboy	James Lizak
Cedric Battle	Dan Kowal
Andrew Bienias	Vern Milligan
William Bragg	William Morris
Samuel Conerly	Mike Morrison
David Danek	Eric Payne
Raymond Dean	Albert Pulliam
Donald Duchak	RaymondPytlarz
Jerome Dvoratchek	Tom Pytlarz
Bruce Fudge	Len Qualkenbush
Wilbur Harsley	Mark Siwy
Jerry Hogan	Curtis Washingon
Sylvester Horton	Jeffrey Wickline
Joseph Judge	Richard Yanos

[11] My findings regarding the negotiations of November 9 are base upon the testimony of Bob Miller, Richard Catalano, Maxine Curtis, Howard L. Bernstein, Ann Chapin's minutes, and Curtis', Miller's, and Catalano's respective notes.

B. *Analysis and Conclusions*

1. The alleged regressive bargaining

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer ''to refuse to bargain collectively with the representatives of his employees.'' Section 8(d) of the Act explains that ''to bargain collectively is the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.'' As the Supreme Court has noted, ''[c]ollective bargaining . . . is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of 'take in or leave it'; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract.'' *NLRB v. Insurance Agent's Union*, 361 U.S. 477, 485 (1960)

In determining whether a party engaged in unlawful surface bargaining or lawful hard bargaining, the Board considers the party's ''overall conduct.'' *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984). One of the indicia of a lack of good-faith in bargaining is ''withdrawal of already agreed-upon provisions.'' (Ibid.) Thus, it is well settled that ''[t]he withdrawal of a proposal by an employer without good cause is evidence of a lack of good-faith bargaining by the employer in violation of Section 8(a)(5) of the Act where the proposal has been tentatively agreed upon . . .'' *Driftwood Convalescent Hospital*, 312 NLRB 247, 252 (quoting *Mead Corp. v. NLRB*, 697 F.2d 1013 (11th Cir. 1983)). The Board has found good cause for such a withdrawal where there was a showing of extremely bad business conditions necessitating concessions by the union representing the employer's employees. *Goldsmith Motors Corp.*, 310 NLRB 1279, 1284 (1993). The Board has also declined to find regressive bargaining unlawful where the employee had valid business reasons for each of its regressive proposals, which it fully explained to the union representing its employees. *Prentice-Hall, Inc.*, 306 NLRB 31, 40 (1992). Thus, where, as here, White Cap has withdrawn from tentative agreements during negotiations, ''the issue here is not whether [White Cap] acted in good faith, but whether [White Cap] had good cause in unilaterally withdrawing from tentative agreements and concessions made.'' *Driftwood*, supra at 252 (1993) (quoting from *Arrow Sash & Door Co.*, 281 NLRB 1108 fn. 2 (1980)).

When the parties finished their negotiations on June 13, White Cap had been trying to convince the 31 litho employees in the bargaining unit that a 12-hour day and a 6-day workweek was good for them. To that point, the unit em-

ployees had voted once, on February 12, and had rejected a proposed collective-bargaining agreement incorporating White Cap's new work scheduling proposals. Now, White Cap had improved that earlier proposed collective-bargaining agreement with economic provisions which it hoped would induce the litho bargaining unit to ratify it and thus accept the 12-hour day and the 6-day week. Local 458's negotiators seemed convinced that this proposal would receive a favorable vote, and expressed this sentiment to White Cap's negotiating team on June 13. On Father's Day, June 19, Local 458's membership voted against the proposed collective-bargaining agreement.

When news of this defeat reached White Cap's Human Resources Manager Maxine Curtis, it provoked her to write the letter of June 23, and fax it to Local 458 on the following day. Curtis expressed disappointment and frustration and then warned of economic reprisals if the unit employees did not ratify White Cap's latest proposed contract by July 1. White Cap's letter asked Local 458 to notify its members that ''[t]hey do have something to lose'' if they reject the proposed contract and to resubmit that proposed contract to the unit employees. The letter urged Local 458 to advise its members ''with the strongest possible message that [the proposed contract] will not be improved.'' White Cap's letter went on to offer a ''further incentive'' to ratify its proposal within a week. Unless Local 458's members ratified by Friday, July 1, White Cap would withdraw the following provisions from its proposal, which Local 458's negotiators had accepted:

> Two percent wage increase effective August 1, 1994
> One percent wage increase effective August 1, 1996
> Proposal to compute overtime after 36 hours
> Proposal to pay vacation pay at 40 hours
> Proposal to pay holiday pay based on 8 hours pay
> Proposal to increase health and welfare contribution by $50.00 per month

White Cap's letter expresses and shows frustration and exasperation at the bargaining unit's rejection of the contract proposal of June 13. On June 20, Catalano had told Maxine Curtis, the letter's author, that the negative vote resulted from fear of the 12-hour day. Instead of attempting to allay that fear, White Cap threatened to withdraw six economic benefits which Local 458 had accepted, unless the unit employees complied with a 7-day deadline.

At first, White Cap flatly rejected Local 458's protests that the deadline did not afford sufficient time to call a meeting, and that July 1 was the Friday before the July 4 weekend, when its members were likely to be out of town. Local 458 asked for an extension of the deadline to Sunday, July 10, the first day the unit employees would be off work and available for a meeting. Contrary to Local 458's request, White Cap moved the deadline to the morning of July 5, 1 day after the July 4th weekend. Clearly, this concession left Local 458 the option of holding a meeting during the holiday weekend with a strong possibility that the few members who might appear and vote would produce the same negative result which had occurred on Fathers Day, June 19. Local 458 proposed a negotiating session at White Cap on July 5, which two of the unit employees opposed to the 12-hour day would attend to hear White Cap's explanation of the 12-hour day. White Cap never responded to this proposal. Local 458 did not hold a meeting to meet the unreasonable July 5 deadline.

White Cap insists that it imposed this short deadline of July 5, because it wanted to implement the 12-hour day and the 6-day week on July 11. However, this urgency was not evident on June 13, when White Cap indicated that September 12 would be a satisfactory implementation date. Indeed, in her testimony before me, Maxine Curtis admitted that White Cap thought September 12 ''would probably make sense logistically . . . .'' When asked on cross-examination for an explanation for the withdrawal of the later implementation date, Curtis did not provide any business-related reason. Instead, she testified in substance, that White simply decided to withdraw September 12 and insist on the July 11 deadline. However, White Cap did not impose this new work schedule on the unit employees until October 10. Thus, I find that White Cap has failed to show that the extensions sought by Local 458 would have harmed White Cap's business operations.

I find that by its threat to withdraw the six provisions listed in its letter of June 23, unless Local 458's membership ratified the entire contract proposal by the morning of July 5, White Cap engaged in regressive bargaining designed to obstruct meaningful bargaining and to frustrate Local 458's efforts to negotiate a collective-bargaining agreement. I find that by this conduct White Cap violated Section 8(a)(5) and (1) of the Act. *Driftwood Convalescent Hospital*, supra at 254.

When the parties next met, on September 14, White Cap's conduct was consistent with its letter of June 23. Maxine Curtis, White Cap's lead negotiator, reminded Local 458 of that letter, which she had authored, and declared that White Cap was ''holding to the letter.'' She reminded Local 458 that if an agreement was not reached by July 1, White Cap would withdraw the six listed provisions. However, the proposed changes announced at this meeting far exceeded those announced in White Cap's letter of June 23. The proposed changes were as follows:

> Withdrawal of the wage increases;
> Termination of COLA's;
> Overtime to begin after 40 hours instead of after 36;
> Change double time after 12 hours of work to time and one-half;
> Reduce the night-shift differential from $.80 to $.40;
> Reduced holiday pay from 8 hours to 7.5 hours;
> Reduce vacation pay from 40 hours to 37.5 hours per week;
> Instead of a $50/month increase effective from the inception of the new contract, White Cap would pay an increase of $20/month the first year, an added $15/month the second year and another $15/ month increase at the inception of the third year of the new contract; Deletion of voluntary overtime provision.

At the next meeting, White Cap embodied these changes in a written proposed collective-bargaining agreement. However, White Cap announced its willingness to negotiate over the proposals regarding wages, vacation, holidays, and night-shift differential. The remaining changes were nonnegotiable.

Here was the regressive bargaining threatened in White Cap's letter of June 23 plus more. Cost of living adjustments had been included in Local 458's collective-bargaining

agreements with White Cap since 1973. The parties had included a COLA provision in their 1991–1994 agreement. COLA had been in White Cap's contract proposals from its first, given to the Union on January 13, to the second proposed agreement if offered to Local 458 on June 13. The letter of June 23 did not mention COLA. The two wage increases included in White Cap's contract proposal of June 13, were withdrawn, along with double time after 12 hours and overtime after 36 hours. Since January 24, White Cap had agreed to include in its contract proposals an 80-cent night-shift differential for all unit employees. On September 14, White Cap proposed a reduction of the night-shift differential to 40 cents. As threatened in it letter of June 23, White Cap reduced holiday pay from 8 hours to 7.5 hours, reduced vacation pay from 40 hours to 37.5 hours per week and withdrew its offer to pay an increase of $50 per month per employee for health and welfare. Instead, White Cap proposed a monthly increase of $20 for the first year of the contract, an added $15 per month for the second year, and another $15-per-month increase in the third year of the contract. White Cap's new contract omitted the voluntary overtime provision which had been included in the contract proposal of June 13, and substituted a mandatory overtime provision. White Cap's letter of June 23 had not mentioned overtime.

In an effort to escape a finding that its withdrawal from tentative agreements as recited above violated the Act, White Cap contends that adverse business conditions necessitated this conduct. At the negotiations on September 14, Maxine Curtis sought to explain White Cap's bargaining stance in terms of economic pressures and its effort to reach quick agreement on the 6-day operation. Curtis told Local 458:

> We sweetened the proposal solely in order to convince you of the 6-day operation in early 1994. We would not ordinarily put them on there. There has been a severe impact on our operations. We have lost productivity with overtime scheduling—$25,000 a month, a $100,000 loss. We have had to shut down lines and find alternatives to the work with outside sources. It caused an imbalance between Litho union and nonunion. It certainly had an impact on our customer deadlines. It added up to costs we have to recoup.

The proffered explanation came too late to show good cause for White Cap's regressive proposals of June 23 and September 14. It came almost 3 months after White Cap's letter of June 23, which threatened withdrawal of six economic proposals which Local 458's bargaining committee had tentatively accepted, subject to ratification by the bargaining unit employees. There was no showing that the economic pressures of which Maxine Curtis spoke on September 14 motivated her letter and White Cap's conduct in June and early July. That letter carried no suggestion of the economic pressures which Maxine Curtis recited on September 14.

Instead, White Cap's decision to combine a threat of regressive bargaining with an unreasonable deadline surfaced in June after the bargaining unit employees had ''disappointed and frustrated'' White Cap by rejecting the proposal of June 13 because of fear of the 12-hour day and the 6-day week. White Cap's letter of June 23 said as much. The same letter showed White Cap's understanding of the unit employees' negative attitude toward the proposed work schedule. Further, the letter left no doubt of White Cap's determination to implement it, with or without the unit employees' approval. If Local 458 did not ratify the proposed contract by July 1, White Cap would withdraw six listed provisions from its proposal.

On September 14, Maxine Curtis repeated the theme of her letter of June 23. She expressed White Cap's disappointment at the unit employees' rejection of its proposed contract of June 13. Later in the same meeting, she referred to that letter and declared ''[W]e did forwarn you if we did not have an agreement, several things would be withdrawn. We are holding to the letter . . . .'' I find that White Cap's proffered excuse was an afterthought designed to camouflage its unlawful regressive bargaining on September 14, September 22, and on October 4, when it carried out its threat and made additional changes calculated to defeat Local 458's effort to reach an agreement. Now, Local 458's members faced a contract proposal which included the 12-hour day, and the 6-day week, and which was otherwise substantially less desirable than the one they rejected on June 19. If, as appeared likely, Local 458's membership rejected this last proposed collective-bargaining agreement, White Cap might impose it without further bargaining if the rejection resulted in an impasse. *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967).

At the hearing before me, White Cap attempted to show that in July and August 1994, a considerable drop in demand for some of its beverage caps diminished its revenue. From these facts, White Cap contends that economic pressure justified its withdrawal of nine proposals on September 14, September 22, and October 4. However, White Cap's argument misses the mark. For, there was no showing that these losses of sales motivated Maxine Curtis's letter of June 23 or that White Cap relied upon them in preparing the position paper to which she referred on September 14. Indeed, according to the testimony of its President and CEO, Bill Burke, White Cap did not sense a possibly significant decrease in its customers' requirements for juice and new age beverage caps until ''somewhere around August of 1994.'' Here, again, I find that White Cap is using an afterthought to excuse its unilateral withdrawal from tentative agreements and the substitution of regressive proposals. Accordingly, I reject White Cap's proffered explanation. Further, I find that its conduct on September 14, September 22, and on October 4, as outlined above, was motivated by a desire to obstruct and frustrate the bargaining process. Thus, I find that White Cap's conduct on those dates violated Section 8(a)(5) and (1) of the Act. *Driftwood Convalescent Hospital*, supra at 253.

2. The unilateral changes

On October 5, White Cap declared an impasse and announced that on October 10, it would implement its final contract proposal of September 22, including the 12-hour day and the 6-day week. On October 10, White Cap implemented its final proposal of September 22 in the bargaining unit, without Local 458's approval. In light of my finding that White Cap violated Section 8(a)(5) and (1) of the Act by its regressive bargaining prior to October 5, there was no legally cognizable impasse on that date. *Park Inn Home for Adults*, 293 NLRB 1082, 1087 fn. 9 (1991). I further find, therefore, that White Cap's unilateral implementation of its final contract proposal of September 22, also violated Section 8(a)(5)

and (1) of the Act. *I.T.T. Rayonier, Inc*. 305 NLRB 445, 446 (1991).

3. The lockout

White Cap locked out the bargaining unit employees from November 21 until October 16, 1995. The lockout notice of November 20, conditioned return to work upon Local 458's ratification of White Cap's final contract proposal of November 9. That final proposal included a modified mandatory overtime provision, a 2-percent wage increase in the second year of the contract, a 2-percent lump-sum payment in each the other 2 years of the contract, weekly vacation payments of 40 hours, holiday pay for 8 hours, restoration of the 80-cent night-shift differential, a $50 increase per employee in monthly health and welfare contributions, and pension contributions based upon the lump-sum payments. White Cap's final proposal had no COLA provision. Also eliminated, were double-time after 12 hours and overtime after 36 hours. Though White Cap's proposal of November 9 was an improvement over its proposal of September 22, and October 4, it was substantially less generous than its proposal of June 13. Thus, I find that White Cap continued to engage in regressive bargaining in violation of Section 8(a)(5) and (1) of the Act on November 9.

White Cap locked out the bargaining unit employees on November 21 to pressure them to accept its final contract proposal of November 9. Thereafter, in 1995, White Cap sought, and hired, at least 12 replacements for its locked-out bargaining unit employees. This was the last of White Cap's efforts to obstruct and frustrate the collective-bargaining process. In locking out and replacing its bargaining unit employees to support its unlawful bargaining position, I find that White Cap violated Section 8(a)(5), (3), and (1) of the Act. *D.C. Liquor Wholesalers*, 292 NLRB 1234, 1237 (1989).[12]

CONCLUSIONS OF LAW

1. White Cap, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 458–3M of the Graphic Communications International Union, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees performing lithographic production work in the classifications listed in appendix A of the collective-bargaining agreement constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material, Local 458 has been and is now the exclusive collective-bargaining representative of the employees employed in the appropriate unit described above, within the meaning of Section 9(a) of the Act.

5. White Cap has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by:

(a) Imposing an unreasonable time limit on Local 458 for ratifying a proposed collective-bargaining agreement.

(b) Withdrawing collective-bargaining proposals to frustrate collective bargaining.

(c) Making regressive contract proposals to frustrate collective bargaining, and by

(d) Unilaterally implementing its proposed ''final offer'' of September 22, and October 4, 1994, without having reached a valid bargaining impasse.

6. White Cap has engaged in unfair labor practices within the meaning of Section 8(a)(5), (3), and (1) of the Act by locking out the unit employees from November 21, 1994, until October 16, 1995, and by hiring replacements for them.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that White Cap has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that White Cap be required to reinstate its final contract proposal of June 13, 1994, and that it afford Local 458 a reasonable period of time to accept that offer, and if Local 458 accepts that offer within a reasonable period of time, sign a collective-bargaining agreement containing all the terms of that offer. I shall also recommend that, pending Local 458's consideration of its contract proposal of June 13, 1994, and upon Local 458's request, White Cap be required to restore the wages, hours and other terms and conditions of employment of bargaining unit employees to the status quo on October 4, 1994. I shall also recommend that White Cap be required to make the unit employees whole for any losses of wages or other benefits they may have suffered as a result of White Cap's unilateral implementation of its ''final'' offer of September 22, and October 4, 1994.

Having found that White Cap unlawfully discriminated against the unit employees by locking them out and hiring replacements, and that White Cap reinstated the locked out employees on October 15, 1995, I shall recommend that these employees be made whole for any losses of pay and benefits they may have suffered by reason of the unlawful lockout, without prejudice to seniority and other rights.

All losses of earnings and other benefits due the unit employees because of the unlawful lockout shall be computed on a quarterly basis from date of the lockout to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). All losses of earning or other benefits due the unit employees because of White Cap's unlawful implementation of terms and conditions of employment on October 10, 1994, shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970). Interest on such losses will be computed in accordance with the policy set forth in *New Horizons*, supra.

[Recommended Order omitted from publication.]

[12] At the close of the General Counsel's case, White Cap moved for dismissal of the complaint in this case on the ground that the evidence presented by the General Counsel was insufficient to support the allegations. I deferred ruling on that motion until I had reviewed the transcript. White Cap renewed this motion in its posttrial brief. Having reviewed the transcript and found that the General Counsel has sustained his burden of proving the violations of the Act alleged in the complaint, I deny White Cap's motion.